92-1995 (1)

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ADVANCE CHEMICAL COMPANY *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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June 17, 1993

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QUESTIONS PRESENTED

1. Does the Superfund statute prevent liable parties from raising any challenges to costs incurred by the United States, including challenges to the wastefulness or the illegality of the costs?

2. Must a court of appeals reviewing a pretrial partial summary judgment ignore subsequent trial findings that show the partial summary judgment to have been in error?

LIST OF PARTIES

The parties to the proceeding below were the petitioners Advance Chemical Co.; AlliedSignal Inc.; American Telephone & Telegraph Company; Ashland Chemical Co.; Atlantic Richfield Company; Borg-Warner Security Corporation; Bridgestone/Firestone, Inc.; Bull HN Information Systems, Inc. (formerly Honeywell Bull Inc.); Exxon Corporation; GenCorp Inc. (DiversiTechGeneral); Magnetic Peripherals, Inc.; Maremount Corporation; McDonnell Douglas Corporation; Mobil Chemical Company; Nalco Chemical Company; Oklahoma Gas & Electric Company; Oklahoma Publishing Co.; Rockwell International Corporation, f/k/a North American Rockwell; Texaco Refining and Marketing, Inc.; Texas Instruments, Inc.; Uniroyal, Inc.; UOP Inc.; Westinghouse Electric Corporation; Weyerhauser Company.

The respondent before this Court, also a party to the proceeding below, is the United States of America.

Pursuant to Supreme Court Rules 14.1(b) and 29.1, the parent companies and not wholly-owned subsidiaries of these petitioners were identified on a 13 page listing filed along with petitioners' April 30, 1993, Application for Extension of Time in Which to File Petition for Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, dated December 21, 1992, is reported at 982 F.2d 1436 and is reproduced at pages 1a-25a of the Appendix to this petition ("Pet. App."). The opinions of the United States District Court for the Western District of Oklahoma, dated December 8, 1989, and August 9, 1990, are reported at 733 F. Supp. 1424 and 750 F. Supp. 1460. Those opinions are reproduced at Pet. App. 252a-285a and 28a-251a. The Order of the United States Court of Appeals for the Tenth Circuit denying rehearing and denying rehearing *en banc*, dated February 17, 1993, is not yet reported and is reproduced at Pet. App. 26a-27a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1992. Pet. App. 25a. The Court of Appeals denied a timely Petition for Rehearing on February 17, 1993. Pet. App. 26a-27a. On May 4, 1993, Justice White issued an order granting petitioners an enlargement of time, until June 17, 1993, to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves two federal statutory provisions. First, section 107(a) of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended [1] ("CERCLA" or "Superfund"), 42 U.S.C. § 9607(a), provides in pertinent part as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b),
>
> * * * *
>
> [certain classes of parties], shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary cost of response incurred by any other person consistent with the national contingency plan;
>
> * * * *

Second, Rule 54(b) of the Federal Rules of Civil Procedure provides as follows:

> JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action,

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[1] The Superfund statute was amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Tenth Circuit in one of the most widely publicized and important cases litigated under the federal Superfund statute, 42 U.S.C. §§ 9601-75. The Tenth Circuit's decision creates splits of opinion among the circuits and announces rules of law that would undermine the Superfund program.

First, in an opinion that conflicts with rulings from the Third, Sixth, and Eighth Circuits, the Tenth Circuit held that private parties can never challenge the costs the Government incurs in a Superfund cleanup; they only have the right to challenge the response action (i.e., the cleanup plan or "remedy") selected by the Government, and the Government is entitled to recover *all* costs incurred in connection with a properly selected remedy—no matter how wasteful, unreasonable or even unlawful those costs might be.

Second, while the court of appeals held that the Government could not recover the costs of an arbitrary and capricious remedy, it nevertheless allowed the Government to recover costs associated with a remedy that the district

court adjudged to be arbitrary and capricious. In a ruling that is consistent with decisions of the First, Fifth, and Federal Circuits but conflicts with decisions of the Seventh, Ninth, and Eleventh Circuits, the court of appeals concluded that it was required to review a pretrial summary judgment award of costs to the Government in light of the record at the time of the judgment—and to ignore the subsequent trial findings which showed that judgment to be in error. Pet. App. 16a.

The origins of this case date back to a decision in 1972 by Mr. Royal N. Hardage to turn his farmland in rural McClain County, Oklahoma into a waste disposal site. Pet. App. 183a. With the approval of the Oklahoma State Department of Health, Mr. Hardage lawfully began to accept hazardous wastes for disposal on his land. For nearly seven years, Mr. Hardage's farm was the only hazardous waste landfill permitted in the State of Oklahoma. Several hundred companies throughout Oklahoma and adjoining states lawfully shipped their industrial wastes to the farm. Pet. App. 184a. In 1979, with the advent of new, more stringent requirements for operating hazardous waste disposal sites, Mr. Hardage's disposal operations came under close scrutiny from the Oklahoma State Department of Health and the U.S. Environmental Protection Agency ("EPA"). In 1980, they forced Mr. Hardage to stop accepting wastes. Pet. App. 193a.

EPA in the early 1980s began to investigate whether the newly enacted Superfund law could be used to make companies that lawfully shipped waste to Mr. Hardage's farm pay for cleanup measures. By early 1983, the Government identified 289 generators and transporters of waste, and advised them that they were potentially liable for the cost of cleaning up the site. In 1984, most of those parties, including petitioners, organized themselves into the Hardage Steering Committee. Pet. App. 43a.

From its early studies of the Hardage site, the Government became convinced that the site could be remediated

only by the excavation and treatment of buried wastes. The Government eventually sued petitioners in June of 1986, seeking a mandatory injunction to compel petitioners to perform EPA's excavation remedy. The Government also demanded that it be reimbursed for all costs that it had incurred, and ever would incur, to develop and implement a remedy for the Hardage site.

Petitioners, concerned that EPA acted prematurely on the basis of incomplete and inaccurate information, retained leading groundwater, hydrogeology, and remedial technology experts to plan and oversee their own, more comprehensive study. That study led the experts to conclude that EPA misunderstood site conditions and misjudged the risks of excavating wastes. With those findings in hand, the experts proceeded to develop an alternative cleanup plan involving the containment and treatment of wastes at the site.

The case proceeded toward a trial in which the district court was asked to choose between the two alternative cleanup plans: a Government excavation plan petitioners estimated to cost in excess of $150 million and petitioners' $54 million containment and treatment plan. Pet. App. 30a. Several months before the November 1989, trial, the government moved for partial summary judgment to recover $6,292,065.25 it had incurred to investigate the site and to advocate the excavation plan it had developed. The district court granted the Government's summary judgment motion, and issued its opinion mid-way through the trial.

At that time, the trial evidence was casting grave doubt on the quality of the work for which the Government was reimbursed. After the trial, the district court decided that the Government's plan was arbitrary, capricious, and unreasonably dangerous to nearby residents and to those who would be asked to construct that remedy. Pet. App. 67a-72a. The district court declared that the Government's plan lacked a scientific foundation and was based

on "fatally flawed" assumptions and "incomplete" information. Pet. App. 59a-63a and 70a-72a.

In contrast to its stinging rejection of the Government plan, the district court praised the work conducted by petitioners. Pet. App. 32a. The court's factual findings about conditions at the site were taken from petitioners' expert studies and the testimony of petitioners' experts. Pet. App. 76a-90a. Petitioners' plan was declared to be "markedly superior" to the plan offered by the Government. Pet. App. 32a. The district court even made the remedy design plan submitted by petitioners part of the court's judgment in the case. Pet. App. 76a-90a.

The district court's rejection of the Government's plan could not be reconciled with its prior award of costs to the Government. But rather than conform the pretrial summary judgment to its trial ruling, the district court reaffirmed and expanded upon the summary judgment. It awarded the Government *all* of the costs it sought in the case—an amount that now exceeds $14 million. *Through that award, the Government was reimbursed for work that the district court found to be arbitrary, capricious, and lacking in scientific foundation.* At the same time, the district court rejected petitioners' claim to have the Government, itself admittedly liable because the Air Force had disposed of hazardous waste at the Hardage site, pay its share of the $6 million in costs petitioners incurred to develop the remedy the court ordered. Pet. App. 148a-156a.

The Government did not appeal from the district court's rejection of the Government's remedy. Petitioners, however, asked the Tenth Circuit Court of Appeals to review the district court's rulings on the legal standards for recovering costs incurred in a Superfund cleanup. The Tenth Circuit affirmed the challenged district court's rulings. It did so by interpreting the Superfund statute in an illogical manner: the losing party at trial, the Government, was allowed to recover all of its past costs, however unreasonable or unnecessary; the winning parties at trial,

petitioners, were allowed to recover only those costs of developing the court-approved remedy that the Government did not contest. Pet. App. 5a. The court of appeals refused to give petitioners the benefit of their successful challenge to the Government's plan. It upheld a pretrial award of costs for work that later was found to be arbitrary and capricious by reasoning—contrary to other circuits—that appellate courts must confine their review to the record at the time of the summary judgment, even if later findings show that judgment to be in error. Pet. App. 16a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision will profoundly and detrimentally influence how the nation's economic resources will be spent on environmental cleanups. The decision merits review by this Court because it conflicts with rulings from other circuit courts on issues of national significance. First, it conflicts with decisions from the Third, Sixth, and Eighth Circuits that permit private parties to challenge the costs incurred to develop and implement Superfund site remedies. The Tenth Circuit's ruling removes any incentive for the Government to manage efficiently a Superfund program that has been criticized sharply and repeatedly for its waste and abuse. Second, the decision, which is consistent with rulings of the First, Fifth and Federal Circuits, conflicts with rulings in the Seventh, Ninth, and Eleventh Circuits that permit appellate courts to set aside interlocutory summary judgments that are inconsistent with later trial findings. There is now a mature conflict among the circuits over this important question of federal civil procedure. In this case, the Tenth Circuit's rule was applied to award the Government costs it was not legally entitled to receive. The integrity and efficiency of the judicial process will be compromised if courts of appeals are obligated to preserve error in pretrial rulings and litigants, like the Government here, are en-

couraged to seek premature summary judgments with the hope of gaining undeserved windfalls.

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS OVER WHETHER CERCLA ALLOWS ANY CHALLENGES TO THE COSTS INCURRED BY THE UNITED STATES TO DEVELOP AND IMPLEMENT REMEDIES AT SUPERFUND SITES.

A. The Tenth Circuit Decision Conflicts With Rulings By the Third, Sixth, and Eighth Circuits That Interpret CERCLA to Permit Separate Challenges to Costs Incurred By EPA.

The Tenth Circuit decision conflicts with decisions from the Third, Sixth, and Eighth Circuits that recognize the right of private parties to challenge the costs incurred by the United States to develop and implement remedies for Superfund sites. That right derives from section 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607 (a)(4)(A), which specifies that the Government may recover from liable parties "all costs . . . incurred . . . not inconsistent with" EPA's National Contingency Plan ("NCP") regulations. Although this legal standard, on its face, refers to "costs," the Tenth Circuit read that word out of the statute. It held that private parties can *never challenge* the costs the Government incurs in a Superfund cleanup because "[c]osts, by themselves, cannot be inconsistent with the NCP. Only response actions —i.e., removal or remedial actions—can be inconsistent with the NCP." Pet. App. 13a. In effect, the Tenth Circuit rewrote section 107(a)(4)(A) of CERCLA to provide that the Government is entitled to recover "all costs, so long as the *response action* is not inconsistent with the NCP."

By contrast, the Third, Sixth, and Eighth Circuits all recognize that private parties have a right to challenge the specific costs that EPA demands that they pay for a Superfund cleanup. The Third Circuit in *Lone Pine Steering Committee v. U.S. EPA*, 777 F.2d 882, 887-88

(3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986) and the Sixth Circuit in *J.V. Peters & Co. v. Administrator, EPA*, 767 F.2d 263, 266 (6th Cir. 1985) discussed this right in the context of rulings which prevented potentially liable parties from obtaining judicial review of EPA's remedy selection decisions until after EPA initiated enforcement actions against them. Those courts justified their preclusion of preenforcement review by reasoning that the defendants in later enforcement actions would have a full and fair opportunity to challenge the remedy *and* the costs sought by the Government.[2]

When it sought to codify the ban on preenforcement judicial review of EPA remedies in the 1986 Amendments to CERCLA, the Government explained that this ban was part of a fair bargain: in exchange for losing the right to challenge EPA remedies at the time the remedies are selected, private parties would be given a later opportunity to challenge both the remedy selected and the costs incurred by EPA. Urging the adoption of what became section 113(j) of CERCLA, the Assistant Attorney General explained to Congress that, following enactment of the "judicial review" amendments now contained in this section of CERCLA, "responsible parties

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[2] *Lone Pine Steering Committee v. U.S. EPA*, 777 F.2d 882, 886-87 (3d Cir. 1985); *J.V. Peters & Co. v. Administrator, EPA*, 767 F.2d 263, 265-66 (6th Cir. 1985). Consistent with the interpretation adopted by the Third and Sixth Circuits, other lower courts have held that parties can challenge individual Government costs as "unreasonable," *United States v. Northernaire Plating Co.*, 685 F. Supp. 1410, 1415, 1418 (W.D. Mich. 1988), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); *United States v. Ward*, 618 F. Supp. 884, 900, 901 (E.D.N.C. 1985); "excessive," *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260, 1272 (D. Mass. 1988); *Industrial Park Development Co. v. EPA*, 604 F. Supp. 1136, 1144 (E.D. Pa. 1985); "unnecessary," *Cabot Corp. v. U.S. EPA*, 677 F. Supp. 823, 829 (E.D. Pa. 1988); and not "cost-effective," *United States v. Reilly Tar & Chemical Corp.*, 606 F. Supp. 412, 421 n.5 (D. Minn. 1985).

will still be able to establish that the [NCP] was not followed *or that specific costs were not proper." Superfund Reauthorization—Judicial & Legal Issues: Hearings on H.R. 2817 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 99th Cong. 1st Sess. 61 (1985) (testimony of Ass't Attorney General Habicht) (emphasis added).

Just as the Justice Department represented to Congress, the Third Circuit in its *Lone Pine* decision explained that the right to challenge costs in a later enforcement action would not be a "pro forma proceeding" but would involve a "*careful and exacting study* by the court." 777 F.2d at 887 (emphasis added). The Sixth Circuit in the *J.V. Peters* case emphasized the rationale for later judicial scrutiny of the costs incurred by EPA in a Superfund cleanup: "The possibility of failing to recoup expenditures in a cost-recovery action operates as an effective constraint upon EPA's decision [to cleanup a site]." 767 F.2d at 266 (quoting from United States' brief).[3]

The Eighth Circuit in *United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO")*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), held that a defendant can challenge costs by introducing "evidence addressing how much of the [response] costs incurred by the [Government], as a result, should be precluded." 810 F.2d at 901. The Eighth Cir-

[3] The Sixth Circuit in *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1508 (6th Cir. 1989) *cert. denied*, 494 U.S. 1057 (1990), later upheld a district court award of costs to the Government, citing the Eighth Circuit's *NEPACCO* decision to support its ruling that the defendants had not carried their burden of proof. The Sixth Circuit reviewed a challenge to EPA's issuance of a $140,419 cleanup contract. The Court, unlike the Tenth Circuit here, did not hold broadly that CERCLA precluded specific challenges to specific costs. Rather, allowing such a challenge, it found that the defendants did not successfully prove that the Government had violated the competitive bidding requirements of 41 U.S.C. § 253 when it awarded that contract.

cuit acknowledged that CERCLA permits private parties to challenge *both* costs *and* response actions. It stated:

> Here, appellants failed to show that the government's response *costs* were *inconsistent with the NCP*. Appellants *also* failed to show that the EPA acted arbitrarily and capriciously in *choosing the particular method* it used to clean up. . . .

id. at 748 (emphasis added). *NEPACCO*'s interpretation of CERCLA follows this Court's reading of CERCLA in *Exxon v. Hunt*: "[T]he NCP provides the appropriate measure of whether a given *expenditure* constitutes 'costs of response or damages or claims which may be compensated' by Superfund." 475 U.S. 355, 374 (1986) (emphasis added).

The Tenth Circuit's rule authorizing the recovery of *all* Government costs incurred in a response action that is not arbitrary and capricious upsets the two-tier level of review that Congress established in CERCLA to ensure that cleanups are *both* selected *and* implemented in a lawful and cost-effective manner. The first level of review is provided in section 113(j), which applies to "the President's *decision in selecting the response action*." 42 U.S.C. § 9613(j)(2) (emphasis added). At that level, a reviewing court may determine whether the wrong remedy has been chosen for a Superfund site. If it was, the relief afforded by section 113(j) is two-fold: the Government cannot recover the costs incurred to develop the arbitrary and capricious remedy, and the chosen remedy may be corrected. *See* 42 U.S.C. § 9613(j)(3). The second level of review is provided in section 107(a)(4)(A) of CERCLA, which authorizes the recovery of "costs not inconsistent with the NCP." 42 U.S.C. § 9607(a)(4)(A). At that level, a reviewing court may decline to award excessive or unreasonable costs even if those costs are incurred to implement a conceptually correct remedy.[4] This two-tier level of review was collapsed

[4] Contrary to the Tenth Circuit's erroneous assumption, the NCP *does* contain specific and enforceable limits on the incurrence of

into one by the Tenth Circuit, which held that the "*sole defense* to liability" for costs under section 107(a)(4)(A) is a showing that "the government's *choice of response action* was arbitrary and capricious." Pet. App. 13a (emphasis added).[5]

The Third, Sixth, and Eighth Circuit decisions recognize that section 107(a)(4)(A) of CERCLA expressly grants liable parties the right to challenge the "costs" incurred by the United States. That right exists independently of the right, under section 113(j) of CERCLA, to challenge the remedies that EPA chooses for Superfund sites. The Tenth Circuit's ruling, by contrast, totally precludes *any* judicial review of the costs incurred to implement a conceptual remedial plan so long as that plan is not arbitrary and capricious.

B. The Tenth Circuit Decision Will Undermine the Superfund Program Goal of Achieving the Widespread, Cost-Effective Cleanup of Waste Disposal Sites.

Despite its name, the Superfund program is not really a "fund" at all. It is a revolving loan program under which the Government raises money through taxes on selected industry groups, spends that money planning and implementing Superfund cleanups, and replenishes the revolving loan fund through administrative and judicial

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costs. It requires that response actions be conducted "under existing programs and authorities" and that federal agencies "expend funds [and] participate in responses to releases under their existing authority." 40 C.F.R. § 300.160(c) (1992). The Government's "existing authorities" include the federal contracting and procurement regulations that forbid Government agencies from incurring excessive costs. *See, e.g.*, 48 C.F.R. §§ 31.201-2 to -5 (1992).

[5] *Compare O'Neil v. Picillo*, 682 F. Supp. 706, 729 (D.R.I. 1988) ("By its own terms, section 107(a) bars 'costs' that are inconsistent with the Plan, not 'actions' "), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

actions brought against the parties made liable under the statute. The Superfund cost recovery provisions addressed in the Tenth Circuit's decision are at the heart of this litigation-driven loan program.

The standard for whether Superfund monies will be spent wisely is contained in section 107(a)(4)A) of CERCLA. If that provision is read to impose no restrictions on the costs incurred, then the Government effectively will have a license to engage in waste and abuse of the sort encountered all too often in a program that has been criticized sharply for those failings.[6] *Under the*

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[6] *See, e.g.*, General Accounting Office, *Superfund: Actions Needed to Correct Longstanding Contract Management Problems* (GAO/T-RCED-92-78, July 8, 1992); General Accounting Office, *Federally Sponsored Contracts: Unallowable and Questionable Indirect Costs Claimed by CH2M Hill* (GAO/T-RCED-92-37, Mar. 19, 1992); General Accounting Office, *Superfund: Issues That Need To Be Addressed Before the Program's Next Reauthorization* (GAO/T-RCED-92-15, Oct. 29, 1991); General Accounting Office, *Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems* (GAO/RCED-92-45, Oct. 24, 1991); General Accounting Office, *EPA's Contract Management: Audit Backlogs and Audit Follow-up Problems Undermine EPA's Contract Management* (GAO/T-RCED-91-5, Dec. 11, 1990); General Accounting Office, *Superfund: Contractors Are Being Too Liberally Indemnified by the Government* (GAO/RCED-89-160, Sept. 26, 1989); General Accounting Office, *Making Superfund Work Better: A Challenge for the New Administration* (GAO/T-RCED-89-48, June 15, 1989); General Accounting Office, *Superfund Contracts: EPA's Procedures for Preventing Conflicts of Interest Need Strengthening* (GAO/RCED-89-57, Feb. 17, 1989); General Accounting Office, *Sound Contract Management Needed at the Environmental Protection Agency* (GAO/T-RCED-89-8, Feb. 23, 1989); General Accounting Office, *Superfund Contracts: EPA Needs to Control Contractor Costs* (GAO/RCED-88-182, July 29, 1988); General Accounting Office, *Superfund Improvement Needed in Work Force Management* (GAO/RCED-88-1, Oct. 1987); Subcomm. on Oversight & Investigations of the House Comm. on Energy & Commerce, 102d Cong., 1st Sess., *Activities of EPA's Office of Inspector General*, (Comm. Print No. 102-E 1991); Office of Technology Assesment, U.S. Congress, *Assessing Contractor Use in Superfund* (Jan. 1989); Surveys & Investigations Staff of the House Comm. on Appropriations,

Tenth Circuit's interpretation of CERCLA, the Government may choose a remedy that is not arbitrary and capricious, and then proceed to act arbitrarily and capriciously to implement that remedy—but still recover all of its costs.[7] Secure in the knowledge that their implementation activities would be beyond the scrutiny of reviewing courts, EPA and its contractors could purchase gold plated bulldozers, spend years to complete work that could be completed in months, throw lavish parties at the close of each day's work, and then send the bills for these excessive charges to liable parties who have no choice but to write out reimbursement checks. At a time when all Government agencies are expected to exercise fiscal restraint and use sound judgment, the Tenth Circuit has announced a rule of law that allows EPA to spend other people's money freely and foolishly.

The Tenth Circuit rule will have a profound adverse economic impact. Under that rule, courts would be obligated to disregard evidence that the Government has spent foolishly or unlawfully on a waste site cleanup. The repeated instances of fraudulent overbilling, excessive costs, and waste that have been well-documented [8] in the

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Status Report on the Environmental Protection Agency's Management of the Superfund Program (Apr. 10, 1985).

[7] *See generally* Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. Envtl. Aff. L. Rev. 1, 40-42 (1990); Note, *Superfund Cost Recovery: May the Government Recover "All Costs" Incurred Under Response Contracts?*, 59 Geo. Wash. L. Rev. 968 (1991); Robert M. Howard, *Government Cost Recovery After the Cleanup: Do the Superfund Amendments Give the EPA a License to Squander?*, 42 Baylor L. Rev. 53 (1990).

[8] *See, e.g.*, General Accounting Office, *Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems* 21 (Oct. 1992); Alfred R. Light, *CERCLA Law and Procedure* 57 (1991) (Government Superfund cost claims have included inappropriate charges such as telephone calls to "900 numbers" published in *Penthouse* magazine).

Superfund program will become the norm if Tenth Circuit's rule is allowed to stand. As forecast by the Third Circuit, the absence of meaningful judicial oversight of EPA's expenditures would be "simply a license to squander." *Lone Pine Steering Committee v. U.S. EPA*, 777 F.2d 882, 887 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). By contrast, the approach followed in the Third, Sixth, and Eighth Circuits will give private parties the right to prove that certain costs violate federal laws that guard against waste and abuse. That right will help ensure that the limited funds available for Superfund cleanups will be invested in better managed cleanups at more waste disposal sites.

II. THE COURT SHOULD RESOLVE A MATURE CONFLICT AMONG THE CIRCUITS OVER THE SCOPE OF APPELLATE REVIEW OF AN INTERLOCUTORY ORDER SHOWN TO BE ERRONEOUS BY EVIDENCE SUBSEQUENTLY PRESENTED AT TRIAL.

The Tenth Circuit's error in limiting review of the Government's costs claims was compounded when it adopted a rule of appellate procedure over which the circuits are split. Following the approach of the First, Fifth, and Federal Circuits, the Tenth Circuit held that an interlocutory partial summary judgment order may be reviewed only on the basis of the record *at the time of the order*, regardless of whether subsequent trial evidence showed the order to be erroneous. Pet. App. 16a. As a result, the Government was allowed to keep the money it was awarded in the pretrial summary judgment even though petitioners successfully proved that the Government's response action was arbitrary, capricious and in violation of the NCP.[9] The Tenth Circuit's decision con-

[9] In its interlocutory order, the district court stated: "To establish that the United States' response actions are inconsistent with the N.C.P., HSC must demonstrate the United States' choice of response actions was arbitrary and capricious." Pet. App. 270a. In its summary judgment ruling, the district court rejected argu-

flicts with decisions of the Seventh, Ninth, and Eleventh Circuits. Under the Tenth Circuit's rule, an appellate court is required to affirm an interlocutory judgment that cannot be supported on the full evidentiary record. The Court should grant certiorari to resolve the conflict.

The Tenth Circuit held that it was required to *ignore* evidence introduced in the trial of this case even though that evidence undermined the basis for the pretrial summary judgment. In unequivocal language, the Tenth Circuit explained:

> As an appellate court reviewing the entry of summary judgment, our review is confined to an examination of the materials before the court at the time the ruling was made. *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985), *cert. denied sub nom., Saugus v. Voutour*, 474 U.S. 1100 (1986). "Neither the evidence offered subsequently at the trial nor the verdict is relevant." *Id.* One who loses on summary judgment cannot give a retroactive effect to a trial verdict, using it in an effort to create a genuine issue of material fact at the time the court was considering the motion for summary judgment. *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1569 (Fed. Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987).

Pet. App. 16a.

A Fifth Circuit panel, in *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988), also

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ments that the Government had "failed to conduct a remedial investigation" and "failed to follow appropriate procedures in performing its feasibility study and selection of remedy." Pet. App. 270a n.15. Later, after all the evidence was in, the district court held that the Government's response action *was* arbitrary and capricious. It did so on grounds that the Government had failed to assess site characteristics, evaluate alternative remedies, assess and weigh cost and safety criteria, and select an acceptable remedy —the very same examples of express violations of the NCP development and selection criteria it had earlier rejected. *See* Pet. App. 59a (1985).

has followed the First Circuit *Voutour* and the Federal Circuit *Glaros* decisions that were cited in the above passage from the Tenth Circuit's opinion. Thus, the First,[10] Fifth, Federal, and now the Tenth Circuit refuse to allow evidence introduced in subsequent district court proceedings to be considered as part of the appellate review of an interlocutory judgment.[11]

That rule is not followed in the Seventh, Ninth, and Eleventh Circuits. The Seventh and Ninth Circuits have held that an interlocutory order always may be revised in light of new evidence at any time prior to final judgment, and that, after the final judgment in the case, appellate review of the interlocutory order must include new evidence that became part of the record after the interlocutory decision. *See Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985); *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970); *see also Trustees of Indiana University v. Aetna Casualty & Surety Co.*, 920 F.2d 429, 433 (7th Cir. 1990).[12] The

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[10] The status of the *Voutour* rule in the First Circuit is not entirely clear. In a subsequent case, *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871 (1st Cir. 1990), the district court reversed an interlocutory judgment based on evidence subsequently to be presented at the trial of claims against other parties. The First Circuit affirmed on the basis of the *full* record, without regard to the record in place at the time of the interlocutory order. *Id.* at 874-75.

[11] Petitioners could not obtain review of the summary judgment at the time it was entered. Except as part of the overall judgment on the complete Government claim in the remedy opinion, that judgment was neither final nor certifiable as a final judgment under Fed. R. Civ. P. 54(b). *See Sears Roebuck & Co. v. Mackey*, 351 U.S. 427, 436-48 (1956).

[12] The Eighth Circuit also recognizes that interlocutory orders may be revised in light of later additions to the factual record. *See Interstate Power Co. v. Kansas City Power & Light*, No. 92-1910, 1993 U.S. App. LEXIS 10351, at *12 (8th Cir. May 6, 1993) (a CERCLA case in which the Eighth Circuit reversed the district court's attempt to make an interlocutory order final and to

Eleventh Circuit similarly has held that appellate review of an interlocutory summary judgment order following final judgment is not limited solely to the evidence available when the summary judgment motion was made, but instead requires consideration of the additional evidence introduced at trial. *See Wenzel v. Boyles Galvanizing Co.*, 920 F.2d 778, 782 (11th Cir. 1991); *Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1567 (11th Cir. 1989).

The Eleventh Circuit, in *Holley v. Northrop Worldwide Aircraft Services, Inc.*, 835 F.2d 1375 (11th Cir. 1988), explained the rationale for the rule it follows:

> a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which militate against his case.

Id. at 1378. Similarly, in *Stuckey*, the Eleventh Circuit stated that

> [e]ven if summary judgment might have been granted at the time the motion was made, we examine the record to see if "by trial the evidence ha[s] been supplemented or changed in some manner favorable to the party who opposed summary judgment."

874 F.2d at 1567 (quoting *Holley*, 835 F.2d at 1378). Given the district court's ruling that the Government's remedy violated the Superfund statute, there can be no doubt that the result in this case would have been different under the rule followed in the Seventh, Ninth and Eleventh Circuits.[13] The court of appeals in this case has

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"foreclose" the option of reconsidering its initial order on "the now-complete factual record").

[13] Prior to the decision challenged here, the Tenth Circuit had appeared to recognize that an interlocutory summary judgment order remains subject to revision on the basis of new evidence prior to final judgment, and that the scope of appellate review is not limited to the record in place at the time of the interlocutory

allowed the Government to do exactly what the rule in those circuits forbids: gain a windfall in plain violation of the statute by relying on the undeveloped state of the facts at the time of the initial summary judgment order.

The Tenth Circuit's approach erroneously treats the review of an interlocutory or partial summary judgment order in exactly the same fashion as a *final* summary judgment that terminates the entire case. Where a summary judgment terminates the whole case, the appellate court necessarily must confine its review to the record that was before the district court when that judgment was made. In that situation, there is no subsequently introduced evidence that could be considered as part of the record on appeal.

This case involves a fundamentally different situation. Here, an interlocutory order was followed by the submission of further evidence and a later final decision by the factfinder. Under the express terms of Rule 54(b) of the Federal Rules of Civil Procedure, a nonfinal interlocutory order such as the district court's pretrial summary judgment

> which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to *any of the claims* or parties, and the order or other form of decision *is subject to revision at any time before the entry of judgment* adjudicating all the claims and rights and liabilities of all the parties.

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order. *See In re Unioil, Inc.*, 962 F.2d 988, 993 (10th Cir. 1992). In *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981), the Tenth Circuit stated that where "new evidence has been introduced" that convinces a court its interlocutory order was erroneous, "the only sensible thing to do is to set itself right to avoid subsequent reversal." Under the Tenth Circuit's rule in this case, however, subsequent reversal of the interlocutory error is no longer a possibility, and the appellate court effectively has an obligation to preserve the error.

Fed. R. Civ. P. 54(b) (emphasis added). The district court remained free at any time prior to final judgment to alter its interlocutory summary judgment award of costs to the Government. Given its later finding that the Government's remedy was arbitrary, capricious and inconsistent with the NCP, the district court here should have revised its pretrial summary judgment to conform to the trial evidence and trial findings. Absent its rule limiting appellate review to the undeveloped record at the summary judgment stage, the Tenth Circuit could have corrected the error.

Rule 54 makes clear that, prior to final judgment, litigation is a fluid process in which the court's evaluation of the parties' rights evolves as the full evidentiary record is developed. The Tenth Circuit's approach instead seeks to freeze one moment in time, review the evidence in place at that moment, and ignore all that comes after. That approach makes sense when the "moment in time" is the end of the whole case. But when the case is in progress, the rule announced by the Tenth Circuit will compromise the integrity and fairness of the judicial process. Courts should not be deterred from correcting errors that become apparent only as the case develops.

The rule adopted by the Tenth Circuit will encourage inefficient and premature resolution of cases through partial summary judgment practice. Litigants will have an incentive to seek multiple piecemeal summary judgments, hoping to lock in an early, undeserved windfall. In CERCLA actions such as this, for example, the Tenth Circuit's rule will encourage the Government to seek costs early on an undeveloped record to obtain premature judgments against private parties that later, at trial, might be able to prove that the Government's response actions were arbitrary and capricious. The credibility of the federal courts necessarily will be diminished by a rule of appellate procedure that leaves a party to pay $6 million to the Government when the district court has explicitly

recognized on the full trial record that the Government had no legal entitlement to the money. The Court should grant certiorari to resolve the split among the courts of appeals and to correct this misapplication of the law.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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